

Canada Industrial Relations Board



Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8
Fax/Télécopieur: 613-995-9493

Our File : 27704-C

Document No.: 271582

December 11, 2009

2009 CIRB LD 2254

BY FAX

Ms. Ronni A. Nordal, L.L.B.
Barrister and Solicitor
P.O. Box 96
Bulyea, Saskatchewan
S0G 0L0 **306-565-3430**

Neuman Thompson
Barristers/Solicitors
200 West Chambers
12220 Stony Plain Road
Edmonton, Alberta
T5N 3Y4 **780-488-0026**

Attention: Mr. Dwayne Chomyn
Ms. Raylene Palichuk

Dear Sir/Madams:

In the matter of the *Canada Labour Code (Part I - Industrial Relations)* and an application for an interim order filed pursuant to section 19.1 and a complaint of unfair labour practice filed pursuant to section 97(1) thereof by Grain Services Union (ILWU - Canada), complainant, alleging violation of sections 94(1)(a), 94(3)(a)(i), 94(3)(a)(vi), 94(3)(b), 94(3)(e) and 96 of the *Code* by Viterra Inc., respondent. (27704-C)

Canada

A panel of the Canada Industrial Relations Board (the Board), composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Patrick J. Heinke and John Bowman, Members, has examined the above-cited application. A hearing was held via teleconference on November 30, 2009.

I - Nature of the Application

On September 3, 2009, the Board received from the Grain Services Union (ILWU - Canada) (GSU) an application for an interim order under section 19.1 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*).

The GSU's request accompanied an application under section 18 of the *Code* to review the bargaining certificate for its office bargaining unit (Office Unit) with the employer Viterra Inc. (Viterra), as well as an allegation of various unfair labour practices.

The GSU requested that the Board deal with the request for an interim order if it would be unable to complete the hearing into the merits of the section 18 application and the unfair labour practice complaint by the end of 2009.

The Board reviewed the parties' initial pleadings and requested supplemental submissions, restricted to the request for an interim order.

The Board advised the parties that it would hear their oral arguments during the case management conference (CMC) scheduled for November 30, 2009. Due to the GSU's time limitations, the CMC dealt only with the section 19.1 application. The Board will schedule another CMC to review all issues related to the upcoming hearing.

The Board has reviewed the parties' submissions, considered the oral submissions from legal counsel and has decided to reject the GSU's request for an interim order.

This letter reflects the Board's reasons.

II - Facts

The GSU contests Viterra's plans to contract out certain Information Technology (IT) functions currently performed by GSU members in the Office Unit. The GSU also alleged that Viterra has inappropriately appointed existing members of the bargaining unit to the position of "Management Analyst", a position that is excluded from the Office Unit.

A significant amount of affidavit evidence was filed with the Board regarding Viterra's plans as well as discussions between the GSU and Viterra.

The GSU confirmed that it currently has filed a grievance under the collective agreement concerning Viterra's plans to contract out IT work.

The GSU and Viterra negotiated an article in the applicable collective agreement dealing with technological change. Article 24.1 of their collective agreement reads as follows:

Article 24.1

In the event the Company plans to eliminate positions as a result of technological change, rail line abandonment, permanent closure, consolidation or contracting out work which results in the permanent layoff of employees, the Company shall give the Union and the employees a minimum of 120 calendar days notice of such. When the notice referred to above indicates that ten percent (10%) or more of the employees are negatively affected, the Company and the Union agree to meet within 30 days to review the opportunities and options available to employees notwithstanding that a collective agreement is in place.

Viterra has decided to proceed with the contracting out of certain IT functions which will lead to the reduction in the number of employees in the GSU's bargaining unit.

The GSU did not contest that Viterra can contract out work under normal circumstances; however, it alleges in its main application that Viterra is targeting the IT unit because of its members' support for the GSU.

The GSU argued that the targeting is designed to undermine the GSU in the eyes of its members. The GSU further argued that the loss of employment for those affected by the technological change violates section 94(3) of the *Code* given the contracting out occurred, in whole or in part, for anti-union reasons.

III - Analysis and Decision

At this stage of the proceeding, where the parties dispute many of the facts, the Board cannot make definite findings of fact. Ultimately, the Board will have to consider whether the employees who were hired for allegedly excluded positions fall within the GSU's bargaining unit. In addition, the Board will have to consider, given section 98(4) of the *Code*, whether Viterra has met its burden, where required, of demonstrating that its actions were not tainted, in whole or in part, by anti-union animus.

At this stage of the proceeding, when considering whether to grant an interim order, the Board is guided by section 19.1 of the *Code*:

19.1 The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

The parties during their oral submissions relied on the Board's recent decision in *Transpro Freight Systems Ltd.*, 2008 CIRB 422, a decision in which the Board examined some of the key objectives of the *Code*. One of the key objectives, as expressed in the Preamble to the *Code*, is the encouragement of free collective bargaining.

In this case, it is not contested by the parties that Article 24.1 of the collective agreement allows contracting out. The GSU argues, however, that there is an implicit restriction on this right to contract out if it is done in whole or in part for anti-union reasons.

The Board is of the view that it is not appropriate to interfere in the commercial arrangements that Viterra has negotiated to date in reliance on its right to contract out. Viterra alleged that there could be significant financial repercussions if its contractual obligations with third parties were put on hold by an interim order of the Board.

The Board has sufficient remedial power should Viterra be unable to meet its burden of proof regarding anti-union animus. A significant remedial order will be available to the GSU if it succeeds on its main complaint.

For the above reasons, the Board has not been convinced in this particular instance to issue an interim order given Viterra's *prima facie* right to contract out work in accordance with the collective agreement.

The matter will now proceed in order to determine, *inter alia*, whether anti-union animus played any part in Viterra's decision to contract out the work of the IT department and whether the Management Analyst position is properly included within the Office Unit.

This is a unanimous decision of the Board and it is signed on its behalf by



Graham J. Clarke
Vice-Chairperson

c.c.: Mr. John Taggart (CIRB - Winnipeg)